

BEEHIVE TELEPHONE CO., INC.

IBLA 78-570 Decided November 9, 1978

Appeal from decision of the Utah State Office, Bureau of Land Management, requiring additional data for right-of-way application U-40390.

Affirmed.

1. Regulations: Generally--Rights-of-Way: Applications

The regulations of this Department have the force and effect of law, and are binding upon the Secretary and those who exercise his delegated authority. An application for a right-of-way pursuant to 43 CFR 2802.1-1 which does not comply with the clear and unequivocal requirements of the regulation must be rejected.

2. Federal Employees and Officers: Generally-- Regulations:
Generally--Rights-of-Way: Applications

Personnel of BLM are not required to alter, modify, or correct an application for a right-of-way in order to conform such application to the requirements of the regulation under which it was filed.

APPEARANCES: A. W. Brothers, President, Beehive Telephone Company, Inc., pro se.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Beehive Telephone Company, Inc., appeals from an August 3, 1978, decision of the Utah State Office, Bureau of Land Management (BLM) holding for rejection its right-of-way application unless certain data were filed with BLM within 30 days.

The BLM decision listed the following omissions and defects in the application:

1. The right-of-way [application] should be made under Title V of the Federal Land Policy and Management Act of October 21, 1976 (90 Stat. 2776; 43 U.S.C. 1761) [FLPMA], as required by 43 CFR 2802.1-1.
2. A statement that the application for right-of-way is made pursuant to the regulations in 43 CFR Subpart 2800, as required by 43 CFR 2802.1-1.
3. A statement that the applicant agrees that the right-of-way, if approved, will be subject to the terms and conditions of the right-of-way and applicable regulations in 43 CFR 2801.1-5, as required by 43 CFR 2802.1-1.
4. Evidence of signing officer's authority to execute this application as required by 43 CFR 2802.1-3(d).
5. The "STOCKHOLDER LIST OF MAJOR OWNERS 3% or more shares" list needs to be corrected as to the total represented. The 65,283 figure should read 65,183.

Beehive Telephone Company, Inc. in their letter of July 26, 1978, requested the Bureau of Land Management, "as to items 1, 2, 3, and 9, [1/] please make the corrections and incorporate your letter as though we had set it forth in full in our application." As required by 43 CFR 2802.1-1, the applicant is the only one authorized to execute the subject requirements. The Bureau of Land Management does not have the authority nor makes it a practice to, make any changes or corrections in an application.

As to item number 5, in the letter of July 26, 1978, Mr. Art Brothers states "... I am the authorized person to make the application and sign it. Signed: Art Brothers. Attest: N. May, Secretary: Seal." However, [in] the information filed with the office of Lt. Governor/Secretary of State, Utah on June 15, 1978, (State of Utah Corporation Annual Report of Organization 1978) A. W. Brothers is listed as President and Secretary of Beehive Telephone Company, Inc. N. L. May is not listed as an officer or director in 1978. The State of Utah Corporation Annual Report Organization 1977, lists N. L. May as Secretary.

1/ Item 9 was listed in the letter of July 17, 1978, from BLM to appellant. Item 9 is identical to item 5 of the decision appealed from.

As noted above, the State of Utah Corporation Annual Report of Organization 1978 lists A. W. Brothers as both President and Secretary of Beehive Telephone Company, Inc. This Annual Report was signed by Mr. Brothers, dated February 2, 1978, and received in the Lt. Governor/Secretary of the State Office, Utah on June 15, 1978. Pursuant to Section 45 of the Business Corporation Act (U.C.A. 16-10-45) (1953) "any two or more offices may be held by the same person, except the offices of President and Secretary shall not be held by the same person."

It appears a conflict in the record exists between the 1978 Annual Report and Beehive Telephone Company, Inc, submittal of July 26, 1978, item number five.

The decision allowed appellant 30 days from receipt thereof to correct the deficiencies and stated that if no action were taken, the application would be closed without further notice.

On August 9, 1978, appellant, in response to item 4 of the decision, submitted to BLM a document styled "Resolution." This document authorizes

Arthur W. Brothers, appellant's President, "to act for and in behalf of the Corporation to file papers, lawsuits, applications, filings, in any manner and form Government of any type might require * * *." However, appellant did not respond to the other items listed in the decision.

The regulations, 43 CFR 2802.1-1(a) and 43 CFR 2802.1-3(d), cited in the decision, state in relevant part, respectively:

Application. (1) The application shall be prepared and submitted in accordance with the requirements of this section. It should be in typewritten form or legible handwriting. It must specify that it is made pursuant to the regulations in this part and that the applicant agrees that the right-of-way if approved, will be subject to the terms and conditions of the applicable regulations contained in this part. It should also cite the act to be invoked and state the primary purpose for which the right-of-way is to be used.

* * * * *

A copy of the resolution or bylaws of the corporation authorizing the filing of the application must also be filed.

Appellant filed the application on May 19, 1978, for a right-of-way to locate telephone lines in Garfield County, Utah. The first paragraph of the application states that "this application is for authority

(FLPMA) to locate telephone lines on Government Land * * *." The fourth paragraph states: "No resolution or by-law notation is required by applicant for this filing as it is a routine construction matter in our day to day operations." Documents submitted with the application list A. W. Brothers as President and Secretary of the corporation but also list N. L. May as Secretary.

Appellant states in support of the appeal that "to set down certain provisions of law which our applications are filed under * * * calls for a conclusion of law and we are simply not qualified to do that." With respect to the last four paragraphs of the decision, appellant notes that "there is no conflict for any items we have filed and we are not even going to bother about it for there is no requirement voiced for any further actions except what we have already filed and supplied." The remainder of appellant's statement in support of the appeal is not responsive to the particulars of the decision and fails to allege any further error therein. Appellant also requests an evidentiary hearing.

[1] As to items 1, 2, and 3 of the decision, we note that a citation to FLPMA is not mandatory. Since appellant invoked "(FLPMA)," the authority was clearly set out. It is mandatory, however, to specify that the application "is made pursuant to the regulations in this part and that the applicant agrees that the right-of-way, if approved, will be subject to the terms and conditions of the applicable regulations * * *." Appellant did not so specify in his application, nor did he correct his application to conform to the regulation in response to the decision. Therefore his application was properly rejected. As was held in Wilfred Plomis, 34 IBLA 222 (1978), once the Secretary of the Interior has promulgated a regulation he is bound to follow it, and such regulation, having the force and effect of law, must be complied with. Leonard E. Simmons, 12 IBLA 196 (1973).

[2] While appellant did cure the defect stated in item 4, the ambiguity referred to in the remaining paragraphs of the decision was not clarified. The conflict is evidenced in the corporate documents filed with the application and the Utah Code Annotated states in section 16-10-45 that "Any two or more offices may be held by the same person except the offices of President and Secretary shall not be held by the same person." Appellant urged BLM to make corrections in his application but it is not the function of BLM employees to correct deficiencies in applications in order to conform to requirements prescribed by regulations. In Lendal R. Smith, Sr., A-28868 (August 10, 1962), it was stated:

To avoid chaos, a land office employee must confine his activity to a determination whether an application

presented to him can be accepted, not to engaging in remedial action which will make it acceptable.

The record herein demonstrated no disputed question of fact requiring an evidentiary hearing, pursuant to 43 CFR 4.415. Appellant's request for a hearing is therefore denied.

Therefore, pursuant to the authority delegated the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed. The application will stand as finally rejected if appellant does not furnish BLM with all the data requested within 30 days from notice to be given by BLM.

Frederick Fishman
Administrative Judge

We concur.

James L. Burski
Administrative Judge

Joan B. Thompson
Administrative Judge

